Contents

Denganizin Yang AmatArif /Yang Arif-Yang Arif

Prelude

The Federal Government and the State Government of Selangor are forcing Islam on the Applicants.

Even though the Applicantssay they profess and practise Hinduism, and have done so all their lives, the government and the Islamic religious authorities are forcing Islamic law to the Appellants and insisting that the Applicantsmust be treated as “Muslims”.

They are trying to force theApplicants, who profess themselves to be Hindus, to go to the syariah courts in order to be judged according to Islamic law.

This case is not an apostasy case. This case is of public interest but only affects a small minority of people in Malaysia caught in a crisis of identity similar to the Applicants.

The case does not in any way jeapordize the interests of the more than 16 million persons actually professing Islam in Malaysia who are free to profess and practice their faiths.

The Applicants are crying out for the Courts' help to stop the authorities forcing Islam on them, and to allow them to live as Hindus in peace and harmony as is their right under our Federal Constitution.

Introduction

1. This is a special reference to the Federal Court pursuant to section 84 of the Courts of Judicature Act 1964 by Order of the learned High Court Judge Yang ArifNurchaya Haji Arshad J sitting in the Shah Alam High Court, in order to assist Her Ladyship in making her decision in this matter.

Facts

2. The exchange of affidavits between the parties has been closed and the material facts in this matter are not in dispute. They are

succinctly set out in the Special Reference. In brief, they are as follows:-

2.1. The 1st Appellant is a Malaysian citizen of Indian ethnicity, born to parents both of whom were also Indian Malaysian.

2.2. The 1st Appellant's Hindu father converted to Islam to marry the 1st Appellant's Indian Muslim mother.

2.3. Although both his parents were shown in their identity documents as being "Muslim", the 1st Appellant says that throughout his formative years his parents followed a Hindu way of life and brought him up as a Hindu.

2.4. The 1st Appellant by a Deed Poll dated 16.03.1973 (gazetted by G.N. No. 1686 of 1973 dated 24 May 1973) adopted a new Hindu name [R/P, page 208 - 211].

2.5. The 1st Appellant is the natural and lawful father of the 2nd to 4th Appellants, who at the time the Originating Summons was filed were all under the age of majority.

2.6. The marriage of the 1st Appellant to his Hindu wife, the mother of the 2nd to 4th Appellants, was registered under the Law Reform (Marriage and Divorce) Act 1976 [R/P, page 214 - 218]. She has filed an affidavit in support of this application [R/P,page 102 - 110]

3. People who are like the Applicants are small in number, but are a significant minority: R/P, page 185, para 16

Relief sought in the Originating Summons

4. By the Originating Summons in this action, the Applicants ask for various declaratory relief relating to the interpretation and constitutionality of various statutes.

4.1. In essence, the thrust of the Applicants' challenge is against provisions in the Administration of the Religion of Islam (State of Selangor) Enactment 2003("the Administration Enactment") which define the Applicants as a "Muslim" and therefore apply Islamic law on them. Although this statute was enacted by the Selangor State

Legislative Assembly, the provisions under challenge are *in parimateria* with provisions in similar legislation in every State in Malaysia [IAP- , Tabs]. These provisions are being challenged as unconstitutionally extending Islamic law to the Applicants even though they profess and practise Hinduism, and have done so all their lives.

4.2. Related to that are various other consequential declaratory relief sought in relation to other provisions in that State enactment, other enactments and a Federal law to wit, the National Registration Regulations1990, and consequential relief as against the 1st to 3rd defendants to respect the Applicant's right to profess and practice Hinduism in peace and harmony.

5. The declarations sought by the Appellants are, in summary, as follows: [See R/P - 2, pp 332 - 349]:

5.1. (para 1) An interpretation that the words "his religion" in Article 11(1) means the religion which a person chooses to profess and practise as his religion and (para 2) the phrase

"person(s) professing the religion of Islam" in various provisions of the Federal Constitution are to be interpreted to mean "a person who acknowledges himself to be a believer of the religion of Islam"

5.2. (para 3) The definition of a person as a 'Muslim' in the Administration of Islamic Law Enactment of Selangor is null and void and (para 5) accordingly, a declaration that the Appellants are no longer "Muslim" under that definition

5.3. (para 4) Any requirement that the Appellants should obtain permission from the Syariah Court before Islamic law ceases to apply to them be considered null and void

5.4. (para 6) The 1st Appellant has the right to determine the religion of his children (the other Appellants in this matter) whilst they are under 18

5.5. (para 7) Any arrest and/or detention of the Appellants by the 2nd defendant pursuant to State Islamic law and (para 8) the issuance or threat of issuance of any document that

requires the Appellants to do or omit to do any act is contrary to law

5.6. (para 9) any treatment of the Appellants as Muslims and (para 10) any compulsion on the Appellants to undergo acts which relate to Islam, are contrary to law

5.7. (para 11) Regulations 5, 14 and the Schedule to the National Registration Regulations 1990 are inconsistent with the Federal Constitution, and

5.8. (para 12) the Appellants shall in all respect of public and private life be recognized by their new names and (para 13) as being Hindus

5.9. (para 14) The 1st Respondent shall cause the educational institutions which the 2nd to 4th Appellants were then enrolled in not to compel or require them to undergo any instruction in Islam

5.10. (para 15) the Appellants are not to be considered as Malays within the meaning of Article 160 of the Federal Constitution

6. The 1st to 3rd Respondents (the Government of Malaysia, the Government of Selangor and the Majlis Agama Islam Selangor) contest this application.

6.1. They contend that the provisions under challenge are applicable to the Appellants because the Appellants have not obtained an order from the syariah courts giving them permission to "leave" Islam.

6.2. An application was made by the Respondents to strike out the Originating Summons herein under Order 18 rule 19 of the Rules of the High Court 1980 as being an abuse of process because the matters raised herein were within the jurisdiction of the Syariah court.

6.3. This application was dismissed by the Court of Appeal on 25th June 2009 in Civil Appeal No. B-01-90-2004 (since

reported at [2009] 6 CLJ 683, and found at R/P, page 39 – 53 and IAR-2, Tab 38) with the action remitted to the High Court for determination on its merits.

Questions for determination of Federal Court

7. The questions now for determination by the Federal Court are:-

Question 1. Are the following paragraphs containing definitions of "a Muslim" in section 2 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 inconsistent with Article 11 (read with Articles 3, 5, 8, 153 and Item 1, List II, 9th Schedule) of the Federal Constitution:

1.1 paragraphs (b), (c), (e) and (f)[1], and

1.2 paragraph (d) read together with section 113[2]?

[1] Paragraph (b) provides that a person is a Muslim if either or both of his parents are Muslim at the time of his birth, Paragraph (c) provides that a person is a Muslim is his upbringing is conducted as if he were a Muslim, Paragraph (e) provides that a person is Muslim if he is commonly reputed to be a Muslim and paragraph (f) provides that a person is Muslim if he state in circumstances where he is required by law to be truthful that he is a Muslim

Question 2. Do the parents of a child under the age of 18 have the right to determine the religion of that child for all public and private purposes pursuant to Article 11 and 12(4) of the Federal Constitution?

Question 3. Is the application of Islamic law on a person who professes himself to be a Hindu but is considered a Muslim under Islamic law inconsistent with Article 11 (read with Articles 3, 5, 8, 153 and Item 1, List II, 9th Schedule) of the Federal Constitution?

Question 4. Does the condition that a person must first get a declaration from the State Religious Council ("*Majlis Agama Islam*") or the Syariah Court that he or she is no longer "a Muslim" before he or she is recognised by the relevant authorities as a person who does not profess Islam render his or her rights under Article 11 (read together with Articles 5, 8,

[2] Paragraph (d) provides that a person is a Muslim if he has converted to Islam, and s 113 says once he has so converted, he shall be treated as a Muslim for all time

153 and Item 1, List II, 9th Schedule) of the Federal Constitution illusory and therefore unconstitutional?

Question 5. Is regulation 14(2)[3] of the *National Registration Regulations* 1990 inconsistent with Article 11 (read with Articles 3, 5, 8, 153 and Item 1, List II, 9th Schedule) of the Federal Constitution and is therefore unconstitutional?

8. The questions are all connected with each other, and inter related. Nevertheless, we will be submitting Question by Question.

[3] Where a person changing his name on his identity card must state the reason other than a change of religion

General principles:The extent of the right of religious freedom in Malaysia and latest cases on Constitutional analysis

Religious Freedom

9. Before embarking on an analysis of the Questions, it would be opportune to firstly set out the protections for religious freedom in the Malaysian Federal Constitution.

9.1. Article 3(1) of the Constitution proclaims both that "Islam is the religion of the Federation" and that other religions may be practised "in peace and harmony". However, Article 3(4) crucially provides that nothing in Article 3 derogates from any other provision of the Federal Constitution.

9.2. Article 11 of the Constitution preserves the rights of all persons in Malaysia to profess and practice "his religion" [Article 11(1)] as well as the rights of religious communities to administer themselves without interference by the State [Article 11(3)]. In addition, there is right not to receive

instruction in a religion other than one's own is guaranteed by Article 12(3).

9.3. The right to profess and practice one's religion does not protect any act done which is prohibited by a general law relating to public order, health or morality [Article 11(5)]. Crucially, and showing how important the right of religious freedom is to Malaysians, the rights protected by Article 11 of the Federal Constitution cannot be abrogated even in times of Emergency [Article 150(6A)].

9.4. The only religious freedom which can be restricted in Malaysia on grounds which are not similar to international human rights standards is found in Article 11(4) of the Federal Constitution which permits State legislative assemblies to make laws restricting the "propagation" of religion amongst persons professing the religion of Islam.

Constitutional analysis

10. It is submitted that in construing the rights of the Applicants to religious freedom, a more liberal approach must be taken in interpreting the Constitutional right whilst a restrictive interpretation must be taken with regard to any curtailment of our fundamental liberties. See the following cases where the Federal Court has recently authoritatively restated the law and the analytical process the Court must go through to see if governmental action unconstitutionally infringes a fundamental liberty:

10.1. *BadanPeguam Malaysia v Kerajaan Malaysia* [2008] 1 CLJ 521@ para 84-89[IAP-3, Tab 42], applying the Court of Appeal decision in *Dr MohdNasirHashim v MenteriDalamNegeri Malaysia*[2006] 6 MLJ 213 @ Para 8, 9, 11 & 15[IAP-3, Tab 46].

10.2. *SivarasaRasiah v BadanPeguam Malaysia &Anor* [2010] 3 CLJ 507@ Para 3 & 5-6, 18-19, 27-34[IAP-3, Tab 43]

10.3. *Shamim Reza Abdul Samadv PP* [2009] 6 CLJ 93 @ Para 3[IAP-3, Tab 45]

10.4. *Lee Kwan Woh v PP* [2009] 5 CLJ 631 @ Para 8 – 13 [IAP-3, Tab 44]

10.5. *Palm Oil Research and Development Board Malaysia &Anor v Premium Vegetable Oils SdnBhd* [2004] 2 CLJ 265 @ page 286h-287d [IAP-3, Tab 47]

11. It is submitted that from the above cases, the following approach must be applied by the Court in every challenge in which it is said that a fundamental liberty has been infringed:

11.1. *fundamental liberties* guaranteed under Part II of the Federal Constitution are to be *generously interpreted*;

11.2. a *prismatic approach* to interpretation must be adopted, such that all facets of the fundamental liberty must be given effect to;

11.3. the Court must bear in mind the *all pervading provision of article 8(1)* which guarantees fairness of all forms of State action

11.4. *provisos or restrictions*that limit or derogate from a guaranteed right *must be read restrictively*;

11.5. the determination by the Legislature of what constitutes reasonable restriction is not final or conclusive but is *subject to the supervision of the Court*.

12. Thus, the Court must go through the following steps:-

12.1. The right claimed must be present in the Federal Constitution when it is interpreted generously and prismatically, bearing in mind the all pervading provision of Article 8(1)

12.2. If the state action being challenged directly affects the fundamental rights or its inevitable effect or consequence on the fundamental rights is such that it makes the

exercise of the right ineffective or illusory, then it is a restriction on the fundamental liberty in question: see *SivarasaRasiah v. BadanPeguam Malaysia &Anor* [2010] 3 CLJ 507 @ 515. [IAP-3, Tab 43], and *DewanUndanganNegeri Kelantan &Anor v Nordin bin Salleh&Anor*[1992] 1 MLJ 697, SC [IAP-3, Tab 49]

12.3. If there has been a restriction on a fundamental liberty, the Court must then see if the relevant restriction being imposed by the government (either by law or governmental action) is reasonably necessary for one or more of the express purposes for which restrictions are permitted by the Article in question: See: *SivarasaRasiah v. BadanPeguam Malaysia &Anor* [2010] 3 CLJ 507 @ 515. [IAP-3, Tab 43] and *Dr MohdNasirHashim v MenteriDalamNegeri Malaysia*[2006] 6 MLJ 213[IAP-3, Tab 46]

12.4. The Court is entitled to strike down legislation if:

(a) The restriction is not within one of the permissible restrictions envisaged by the Federal Constitution

(b) The restriction is not in the Court's view reasonably necessary to achieve the object of the permissible restriction

(c) The restriction is *disproportionate* to the object sought to be achieved.

13. The provisions being challenged are not said to be required for public order, health or morality. The questions resolve mainly on whether or not the provisions in question are consistent or not with the Federal Constitution.

Question 1: The other definitions of "a Muslim" are inconsistent with the phrase "a person professing the religion of Islam"

14. To fully appreciate the impact of Question 1, it would be useful to reproduce the relevant provisions of the two main provisions

in question. The definition of a Muslim is found in section 2 of the Administration Enactment, and reads in full as follows:-

> "In this Enactment, unless the context otherwise requires-…
>
> 'Muslim' means-
>
> (a) a person who professes the religion of Islam;
>
> (b) a person either or both of whose parents were, at the time of the person's birth, Muslims;
>
> (c) a person whose upbringing was conducted on the basis that he was a Muslim;
>
> (d) a person who has converted to Islam in accordance with the requirements of section 85;
>
> (e) a person who is commonly reputed to be a Muslim; or
>
> (f) a person who is shown to have stated, in circumstances in which he was bound by law to state

> the truth, that he was a Muslim whether the statement be verbal or written; ”

15. However, the word “Muslim” does not appear anywhere in the Federal Constitution (save in the title of the repealed Article 161C – “Muslim education in the Borneo States”). When the Constitution refers to people who we refer to as “Muslim”, the Constitution refers to “persons professing the religion of Islam”. This is most apparent in Item 1, List II, Schedule 9 of the Federal Constitution (“*Item 1 of the State List*”) which provides that State legislatures can make laws regarding the following matters (emphasis added):

> “Except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic law and personal and family law of <u>persons professing the religion of Islam</u>, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions, and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of

> Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Bait-ul-Mal or similar Islamic religious revenue; mosques or any Islamic public places of worship; creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organisation and procedure of Syariah courts which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine Malay custom."

16. It is immediately apparent that the definition of Muslim includes various factors that are not expressly permitted in Item 1. Only definition (a) follows the Constitution's wording. The 1st Question before this Court thus asks if those additional definitions in paragraphs (b) to (f) are consistent with the phrase "person

professing the religion of Islam". To analyse that question, we must first examine what "profess" means.

Profess

17. It is submitted that the word 'profess' denotes the personal will of that person is in question. Profess means to 'affirm one's faith in or allegiance to a religion'. In all the following definitions of profess, both in dictionaries and in judicial pronouncements, one finds two common elements - one is the concept of self determination. The other is the concept of an outward action denoting one's own concept of who one is.

Definitions of Profess

18. The Concise Oxford English Dictionary's definition of "professed" is 'self-acknowledged' [IAP-4, Tab 65]. It is submitted that the word '*Profess*' used in Art 11(1) means "to declare openly and freely" and thus must be interpreted to mean that a person "professes" a religion only when that person his or herself freely and openly declares it as such.

19. In *Re Mohamed Said Nabi, Deceased* [1965] 3 MLJ 121 @ 122 [IAP-4, Tab 68], the High Court was faced with the question of whether a deceased man remained a person professing Islam given evidence that he ate pork and drank alcohol. The High Court adopted the definition of the word "profess" found in the Shorter Oxford English Dictionary [IAP-4, Tab 64] which was "*to affirm, or declare one's faith in or allegiance to (a religion, principle, God or Saint etc.)*" and held the deceased remained a person professing Islam.

20. *Black's Law Dictionary, Pg 1246* [IAP-4, Tab 67] defines "Profess" as "*To declare openly and freely; to confess*".

21. This interpretation of the word "profess" is one shared by the Supreme Court of India.

    21.1. In *Punjab Rao v D. P. Meshram&Ors* [1965] 1 SCR 849 @ 859 [IAP-4, Tab 71], the Supreme Court had to determine whether a person was a member of the Scheduled Castes within the meaning of the Indian

Constitution (Scheduled Castes) Order 1950[4]. If the person in question was from the scheduled castes, his election as a member of Parliament for an electoral constituency reserved for the scheduled castes would have been valid. If not, his election would be null and void.

21.2. Overturning the Bombay High Court, the Supreme Court held that a public declaration of belief in Buddhism was sufficient to hold that a person had ceased to profess Hinduism and that it was unnecessary to see if the conversion was "efficacious". The *ratio* of the Supreme Court can be found, it is submitted, at p. 859D of the case where it was said:-

> "The meaning of the word "profess" have been given thus in *Webster's New Word Dictionary*: 'to avow publicly; to make an open declaration of; .....to declare one's belief in: as, to profess Christ. To accept into a religious order.' The meanings given in the *Shorter Oxford Dictionary* are more or less the same. It seems to us that the meaning

[4]The scheduled castes comprise persons traditionally discriminated against by orthodox Hindus and Sikhs and for which special provisions are guaranteed by the Constitution of India.

> 'to declare one's belief in: as, to profess Christ' is one which we have to bear in mind while construing the aforesaid order because it is this which bears upon religious belief and consequently also upon a change in religious belief. It would thus follow that a declaration of one's belief must necessarily mean a declaration in such a way that it would be known to those whom it may interest. Therefore, if a public declaration is made by a person that he has ceased to belong to his old religion and has accepted another religion he will be taken as professing the other religion. In the face of such an open declaration it would be idle to enquire further as to whether the conversion to another religion was efficacious." [Emphasis added]

21.3. Similarly, in *John Vallamattom v Union of India* (2003) 6 SCC 611 @ Para 40 [IAP-4, Tab 70], it was said that Article 25 if the Indian Constitution (the equivalent of our Article 11) "*provides freedom of "profession", meaning thereby the right of the believer to state his creed in public...*"

22. There is even a Syariah court decision which emphasises the personal choice involved in Article 11(1) of the Federal Constitution. In *RoslindaMohd Rafi v KetuaPendaftarMuallaf, Sabah*[2009] 1 CLJ (SYA) 485 @ 490, 491 [IAP-4, Tab 69], the SyariahHigh Court in Kota Kinabalu held as follows:–

> "Artikel 11(1) jugamenunjukkanbahawaseseorangtidakbolehdipaksa untukmenganutatauterusmenganutmana-mana agama.Dengan kata lain sebarangtindakan yang menghalangindividuuntukmemilihagamanyaadalahti dakdibenarkan…soalseseorangitumahumurtadataume murtadkandirinyaadalahhakindividuselaridengan art 11(1) Perlembagaan Persekutuan."

23. As an aside, although the learned Judge there used the Malay word "*menganut*" to describe the word "*profess*", it is submitted that this is not a proper translation of the concept of "*profess*" although the learned Judge gave to "*menganut*" in substance the English meaning of profess. The word "*menganut*" implies an element of "*belief*" – penganut, we would suggest, is better translated as "*believer*". It is not an accurate translation of the

phrase "*person professing the religion of Islam*", and it appears there is no equivalent direct Malay word for "*profess*". The closest translation, it is submitted, would be "*orang yang mengakuidirinyaberagama Islam*".

24. Finally, even the learned Judge in the Court below who referred this matter to the Federal Court said this [R/P, Vol 2, page 320-321]:-

> "Article 11(1) of the Federal Constitution provides that every person has the right to profess and practice his religion, and subject to Clause (4, to propagate it.
>
> One of the declarations sought by the plaintiff's is that the word "his religion" in Article 11(1) means the religion which a person chooses to profess and practice as his religion.
>
> The right "to profess and practice his religion" is provided under that part of the Constitution intituled 'Fundamental Liberties' and under that Article bearing the heaing 'Freedom of Religion'.

Prima facie, I would give that provision of the Constitution the broadest meaning feasible, unless in so far as the Constitution itself restricts the meaning, or a logical conclusion flowing therefrom prevents or negates such a meaning.

The disputed [*sic*] here lies in what "his religion" means. Is the phrase "his religion" restricted to mean that single religion which a person now has, and no other? Or does the phrase 'his religion' mean any religion a person may choose to profess or practice? Does Article 11(1) give no more right to a person other than to 'profess and practice' his pre-existing religion and no other.

The word 'to profess' by it [*sic*] plain dictionary meaning denotes to declare openly, to announce, affirm, to avow, acknowledge, to lay claim to, amongst others. The roots of the word 'profess' may be traced to Latin. The word 'profess' is derived from the Latin 'professes' having the meaning of taken religious vows, and 'profiteri' having the meaning of todeclare publicly, to make a public statement, to declare oneself, to acknowledge, confess, offer, promise.

> *I am satisfied that right to 'profess' his religion entitled a person with full liberty to declare his religion as he chooses, and that unfettered personal freedom is a fundamental right guaranteed by our constitution.*" [Emphasis added]

Analysis: the impugned definitions are all unconstitutional

25. '*Profess'* , it is thus submitted, means that the *individual* declares or expresses what his or her religion is. As long as that declaration is meant seriously, made of that person's free will and has not been retracted, that declaration is sufficient for that person to enjoy to the fullest extent his or her freedom of religion as protected by Article 11 of the Federal Constitution.

26. The meaning of "*persons professing the religion of Islam*" must therefore mean those persons who openly declare or acknowledge themselves as belonging to the Islamic faith. The use of the present tense in "*professing*" must also have some meaning - it must mean that the person concerned must, at the time Islamic law is being imposed on him, profess Islam as his religion. It is not sufficient that at some time he professed Islam.

27. It is submitted that this interpretation accords not only with the dictionary meaning of the word "*profess*". It is also in accordance with a purposive interpretation of the word read in the light of our Constitutional scheme. Article 3 provides both that "*Islam is the religion of the Federation*" and also that "*other religions may be practised in peace and harmony*". Article 11 preserves the right of <u>all persons</u> in Malaysia to religious freedom, which right cannot be abrogated even in an Emergency. Our Constitutional scheme therefore is careful to protect religious liberty and to ensure that Islamic law is not imposed on persons professing other religions.

28. In short, therefore, '*Profess'* is what that the person says he is – not what other people say he or she should or should not be. To define profess any other way would lead to absurdity and would render an individual's fundamental liberty to *"profess"* his or her religion ineffective.

29. This does not mean, however, that this freedom protected to the individual allows that person to "force" himself on a religious community that does not want him. Article 11(3) of the Federal

Constitution protects the rights of religious communities to worship in common with each other, and a religious community or a mosque, temple or church is perfectly entitled to put restrictions on those who wish to enter or participate in religious ceremonies or communal acts of worship.Article 11(3) protects '*religious groups*' from interference by the State (*AcharyaJagadishwaranandaAvadhuta and Anor v Commissioner of Police, Calcutta and Ors* AIR 1990 Cal. 336 @ Page 349 [IAP 4, Tab 85]). It is important to note, however, that Article 11(3) does *not*permit the State to impose fetters on an individual's liberties under Article 11(1).

30. As has been pointed out, only definition (a) mirrors the wording of Item 1 of the State List. No complaint is made against this definition. The other definitions are, it is submitted, totally inconsistent with the Federal Constitution especially when one has regard to the fundamental liberty of person and to freedom of religion, all of which must be read prismatically given the overriding provisions in Article 8 guaranteeing equality under the law.

Definition (b): "a person, either or both of whose parents were, at the time of the person's birth, Muslims".

31. Definition (b) is clearly inconsistent with the requirement of the Constitution that requires Islamic law only to be applied over "persons professing the religion of Islam".

32. It is also inconsistent with Article 8(2) of the Federal Constitution prohibiting discrimination on the basis of descent. Discriminating against someone based on his descent is prohibited by Article 8(2). A person professing Islam may well have been born to Muslim parents. But a person born to Muslim parents may not necessarily profess Islam.

Definition (c) "a person whose upbringing was conducted on the basis that he was a Muslim"

33. Again, this definition is self evidently inconsistent with the phrase "person professing Islam". A person could have been brought up a Muslim but that does not mean he professes Islam.

Definition (d) "a person who has converted to Islam in accordance with the requirements of section 85 and/or section 91(1) and/or 91(2)" read together with section 113 treating such persons as Muslim "for all time"

34. When he or she signs a conversion certificate, a person may well be professing Islam. But to then treat that person as a Muslim for all time goes well beyond the scope of Item 1 of the State List.

35. A person cannot be said to be "professing" Islam for *all time* merely because he or she had converted to Islam at some point. Islamic law on this matter must be considered subordinate to the words of the Federal Constitution.

Definition (e) "a person who is commonly reputed to be a Muslim"

36. This is perhaps the most absurd of the definitions found in Act 505. It imposes Islamic law on a person who professes another religion just because others think he is a Muslim. There is, with

respect, no connection between this definition and the phrase "person professing the religion of Islam" at all.

Definition (f) "a person who is shown to have stated, in circumstances in which he was bound by law to state the truth, that he was a Muslim, whether the statement be verbal or written"

37. Again, such a declaration may well have been evidence that the person in question professed Islam at that material time. If no other evidence is brought to show that the person had recanted or converted, such a declaration may well be considered determinative of the question of what that person professed as his religion. But to define a person as a Muslim merely because at some point he had made such a declaration is inconsistent with the Federal Constitution's guarantees.

Conclusion: The impugned definitions are all unconstitutional

38. It cannot be said that the impugned definitions are merely extensions and interpretations of the Constitutional formulation of a "*person professing the religion of Islam*". The definitions are

clearly inconsistent as they stand. It is not the function of the Legislature to interpret a provision of law, particularly when there are restrictions placed on it by the Constitution (See: *N.S. Bindra's Interpretation of Statutes, 9th Edition, Page 12* [IAP-3, Tab 48]).

39. The very fact that definition (a) is in the statute, containing words identical to the Constitutional formulation, with other definitions then inserted after that show clearly that something different was intended by the Legislature when they enacted section 2. Parliament is presumed not to have legislated in vain: *KrishnadasAchutan Nair &Ors. vManiyamSamykano* [1997] 1 CLJ 636 @ 645a-c, FC [IAP-4, Tab 87].Here, they have sought to add other types of persons as "Muslim", no doubt perhaps for good reasons. But as pointed out by Edgar Joseph Jr SCJ in *NordinSalleh*the "best of intentions" cannot salvage an otherwise unconstitutional law.

40. The impugned definitions '*directly affect*' the Applicants'right to profess their religion of Hinduism.The Applicants are unable to profess themselves as Hindu or be recognised as Hindus by the

authorities. The Applicants are therefore at risk of being subjected to detention in an Islamic rehabilitation centre, be made to attend religious counseling sessions, fine, imprisonment and/or whipping for a variety of offences which are legal for Hindus but contrary to Islamic criminal law for "Muslims".The Applicants are liable to have their body taken upon their death by the Islamic religious authorities. The evidence shows that the 2nd to 4th Applicants suffered indignity, embarrassment and humiliation in school during their formative years because of this problem [R/P, page 82, para 28].

41. Thus, Question 1should be answered in the affirmative. The impugned definitions are inconsistent with the various provisions of the Federal Constitution, and should be declared null and void.

Question 2: Parents still have the right to determine the religion of their underaged children in Malaysia

42. This question is in fact an invitation to the Federal Court to affirm and clarify the decision in *TeohEngHuat v Kadhi,Pasir Mas&Anor*[1990] 1 CLJ 277 (Rep) SC @ 280e-281b.The Supreme

Court there held that Article 12(4) of the Federal Constitution meant that a parent had the right to determine the religion of his child for all purposes, and not merely for the purposes of the child's religious education. However, the Supreme Court put a line to say that this was for "non Muslims". It should be clarified that this principle applies even to those who are in the Applicants' position and are persons professing Hinduism and wrongly being classified as "Muslim".

43. This proviso causes confusion in cases such as the present where the Applicants claim they are being treated as Muslim unconstitutionally, and in a dispute with the religious authorities.

44. It is submitted that the rationale of the Supreme Court in Susie Teoh's case applies equally to Muslim and non Muslim parents. This is important because Article 12(4) on its face applies only to the right of determining religious education. That clause does not restrict itself to non Muslim children only. All parents in Malaysia have a right to determine the religious education of their children. As such, all parents should also have a right to

determine the religion of their children until the age of majority is achieved.

45. It should be mentioned, however, that the Federal Court does not need to answer the vexed question of whether this gives a right to both parents or either parent, as there is no dispute between the parents in this case.

Question 3: The provisions of a particular religious law cannot override the Federal Constitution. Even if Islamic law says the Applicants are "Muslim", what determines matters is what the Applicants' profess and practice.

Question 4: Forcing a person to get permission from a religious authority before being allowed to convert out of that religion is unconstitutional

46. It is convenient to deal with Questions 3 and 4 together.

Allowing conversion without permission will not cause people to avoid their obligations

47. In *Kamariahbte Ali dan lain-lain v KerajaanNegeri Kelantan dansatulagi* [2005] 1 MLJ 197, FC [IAP-4, Tab 84], the Appellants made a statutory declaration that they had left Islam on August 1998. They were sentenced to imprisonment on 5-10-2000 by the Syariah court for offences committed *before* August 1998 (@ para 30). The Chief Justice held:-

> "(@ para 37) ...walau pun perayu-perayutelahmengisytiharkanmerekamurtadpadatahun 1998, merekaselayaknyadibawakehadapanMahkamahSyariahpadatahun 2000 keranaiaberkaitansuatukesalahan yang telahdilakukanketikaperayu-perayumasihberagama Islam. Jikapendekatanmaksudtidakdiambil, orang-orang Islam yang menghadapipertuduhan di MahkamahSyariahbolehsewenang-wenangnyamenimbulkanpembelaan yang merekabukanlagiseorang yang menganut agama Islam dandengandemikiantidaktertaklukkepadabidangkuasaMahkamahSyariah."

48. This same principle was applied by the Federal Court in *Subashini's case* in the reverse scenario where the Court, relying on *Kamariah's case*, held that a husband who has converted into Islam cannot hide behind Article 11(1) to avoid his antecedent obligations under the Law Reform (Marriage and Divorce) Act 1976.

49. The principle which emerges from those cases is that Article 11(1) while giving individuals the right to profess their religion of choice, does not allow them to evade *pre-existing* legal obligations. No allegations have been raised that the Applicants have any pending legal obligations under Syariah law.

50. Any *law* forcing profession of religion would violate the constitutional guarantee of 'Freedom of Religion'. AsafFyzee in *The Reinterpretation of Islam*, University Of Malaya Law Review, 1959, Vol 1. No.1 Pg 39 [IAP-4, Tab 63] wrote:-

> "(@ pg 40) Democracy insists that the State is one and that its laws are ofequal application. Laws are impersonal and objective rules which thestate applies

to all its citizens without exception. But religion is basedon the personal experience of great teachers; its appeal is personal,immediate and intuitive. While its laws and its ritual and its trappingscan be of general application in a community, the inner core of belief isexclusively personal. No state can compel religious allegiance as it canenforce its laws. Hence the well-known dicta of the law that before thelaw, all religions are equal; that the question of a particular belief is anobjective fact as far as the court is concerned, to be proved or disprovedas any other fact, and that the court cannot be called upon to determinethe truth or otherwise of a religious belief. The faith of Islam canteach the belief in one God and His Messengers; but it cannot and oughtnot to lay down *how* I am to apprehend God and *how* it can enforce suchobedience. By "enforce" is meant (a) order the doing of a thing and (b)punish its disobedience. How can a matter of faith be a matter of enforcementby an outside agency? A teacher can teach me; he can inspire me byhis example; he can fire my enthusiasm. But how can he make mebelieve? Thus there is a clear difference between a rule of law whichcan be enforced by the state, and a rule of conscience which is entirely aman's own affair." [Emphasis added]

51. It is submitted that the Constitution was drafted such in order to ensure that all laws on the *administration* of Islamic law is premised on the *consent* of those affected by it, by way of *profession of the religion of Islam*. Similarly, by using the words "professing the religion of Islam" rather than "Muslim", the Constitution avoids dragging the Muslim community into an exercise in which one questions another's religious conduct thus avoiding the divisive and damaging act of "*kafir – mengkafir*".

52. The drafters assigned powers to the State Legislature to *constitute* Syariah courts and assigned the *judicial power of the Federation* to the High Courts. Syariah courts do not enjoy the same status and powers as the High Courts (per HishamuddinYunus J in *Dato' Kadar Shah TunSulaiman v DatinFauziahHaron* [2008] 4 CLJ 504 @ Para 15 [IAP-2, Tab 32], applying the principles established by this Court in *Latifah Mat Zin v RosmawatiSharibun&Anor* [2007] 5 CLJ 253, FC @ Para 42-46 [IAP-2, Tab 30] and *Abdul Kahar Ahmad v KerajaanNegeri Selangor DarulEhsan; Kerajaan Malaysia &Anor (Interveners)* [2008] 4 CLJ 309 @ Para 16 [IAP-2, Tab 31].

This application is not a matter of "Islamic law" which in any event cannot trump the Constitution

53. This application does not affect the rights and freedoms of the Muslim community. The relief sought relate to the constitutionality of *laws* and not to the doctrines of Islam. No person can be subjected to Islamic law unless it has been *legislated* and it is *consistent* with the Constitution. The power to make Islamic law is exercisable only by the *Legislature* and not the Muslim community. The Supreme Court in *Che Omar Bin CheSoh v Public Prosecutor* [1988] 2 MLJ 55 @ pg 56F-H, 57A-F [IAP-4, Tab 50] dealt with this very issue when it said:-

> "(@ pg 57A-C)…the contention…that because Islam is the religion of the Federation, the law passed by Parliament must be imbued with Islamic and religious principles and…because Syariah law is the existing law at the time of Merdeka, any law of general application in this country must conform to Syariah law…will be contrary to the constitutional and legal history of the Federation and also to the

> Civil Law Act which provides for the reception of English common law in this country."
>
> [Emphasis added]

54. Mr Justice HashimYeopSani writing extra-judicially in his book "*Our Constitution*" [IAP-4, Tab 61] also states:-

> "(@ pg 153)...in Malaysia, Muslim laws are not applied...in their pure form. It is also to be noted that the various state legislations in Malaysia and Singapore in the main deal with the administration of Muslim laws and not with the substantive Muslim laws."

55. With respect, it would also misconceived to consider that the '*subject matter*' of this application belongs to the Syariah court.

55.1. The Syariah courts cannot be given jurisdiction to determine whether or not a person is a "*person professing the religion of Islam*". If they decide the person does not profess Islam, the very basis of their jurisdiction vanishes and their decision would have been *ultra vires*: *New India*

Assurance Company Ltd v Lewis [1967] 1 MLJ 156 @ Pg 157D-F, I [IAP-2, Tab 36]

55.2. The question of whether a person is a "Muslim" within the meaning of Islamic law may be a question for the Syariah courts. But the question of whether or not a person "professes" the religion of Islam, or any religion for that matter, is a question of fact for the Civil courts as was done in *Re Mohamed Said Nabi (see paragraph 19 above)*.

55.3. Interpretation of the Federal Constitution*vis-a-vis* other written laws, the '*subject matter*' of this case, is a matter for the Civil court (*ZainaAbidin*@ Para 11, CA [IAP-2, Tab 38]).

56. The choice as to one's religion is a civil right enshrined and guaranteed under Article 11 of the Federal Constitution. It is a rightexercisable by all '*persons'*, irrespective of religion.

Obiter comment in DalipKaur's case not applicable

57. The Supreme Court decision in *DalipKaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam&Anor*[1992] 1 MLJ 1, SC is often cited as a proposition that cases such as this should be heard in the Syariah court. Reliance is placed on a statement by Mohamed Yusoff SCJ to the effect that whether or not someone has committed apostasy from Islam is a matter of Islamic law which requires expert evidence from Islamic law scholars. But what is often forgotten is that this did not form the basis of His Lordship's decision and was said *obiter*, and did not receive the concurrence of the majority of the Supreme Court there.

57.1. The facts of that case show that the parties had by *consent* agreed to refer the matter to the Fatwa Commitee of Kedah. Mohamed Yusoff SCJ dismissed the appeal and accepted that the advice of the Fatwa Committee to the effect that the deceased was a Muslim was binding on the parties. Crucially, Mohamed Yusoff SCJ *dismissed* the appeal and did not instead refuse to hear the appeal on the

grounds that the Court had no jurisdiction to hear the matter.

57.2. The majority(consisting of HashimYeop A. Sani CJ (Malaya) and Harun M. Hashim SCJ) held as follows:-

> "(@ pg 7F-H)...[Clause 1A of Article 121] does not take away the jurisdiction of the civil Court to interpret any written laws of the States enacted for the administration of Muslim law. One of the opinions given in the *fatwa* of the Fatwa Committee in this case was that a convert who executes a deed poll renouncing Islam is a *murtad* (apostate). Of course this opinion is valid only for the State of Kedah. If there are clear provisions in the State Enactment the task of the civil Court is made easier when it is asked to make a declaration relating to the status of a person whether such person is or is not a Muslim under the Enactment. A clear provision can for example be in the form of a provision imposing obligation on the relevant authority to keep and maintain a register of converts who have executed a deed poll renouncing Islam." [Emphasis added]

57.3. It can thus be seen that *DalipKaur* is no authority for saying that this matter must be heard in the Syariah court. On the contrary, the majority decision supports the Applicant's position that this matter involving as it does the interpretation of statute and the impact of the Federal Constitution on statute law can ***only*** be heard by this Court.

Current law on jurisdiction: Latifah& Haji Kahar

58. A unanimous Federal Court in *Latifahbte Mat Zin v RosmawatibteSharibun&Anor*[2007] 5 CLJ 253, FC [IAP-2, Tab 30] seems to have put to rest the contention that the Syariah court might have jurisdiction in circumstances such as these.

58.1. It is submitted that this case makes it clear that in determining the jurisdiction of the Syariah Court, it is necessary to consider if the court has expressly been conferred jurisdiction by State law over a particular subject matter. "*It can never be that once the syariah courts are established the courts are seized with jurisdiction over all*

the matters mentioned in Item 1 automatically. It has to be provided for."[At para. 43]

58.2. The Federal Court held that it is not enough that the subject matter of the dispute is within the Syariah court's jurisdiction. In addition, it must also be shown that all parties to the dispute professed Islam. The Syariah Court only has jurisdiction if both requirements are fulfilled: paragraphs 45, 49

59. This decision has been applied by the Federal Court in *Abdul Kahar bin Ahmad v KerajaanNegeri Selangor (Kerajaan Malaysia, Intervener) &Anor*, [2008] 4 CLJ 309, FC [IAP-2, Tab 31], where the Federal Court stated as follows:-

> (@ 314) "[12] … The issue is simple: Is it this court or the Syariah High Court that is seized with the jurisdiction to decide whether the stated provisions of the said Enactments are in accordance with the provision of the Federal Constitution? That is the net effect of the issue posed in this application…

(@ 315 – 316)“ [16]… The motion clearly prays for an order that the issue whether the impugned provisions are consistent with precepts of Islam as provided by Paragraph 1, State List, Ninth Schedule of the Federal Constitution *must be decided* by the Syariah High Court as provided by art 121(1A) of the Federal Constitution. That clearly is asking for the interpretation of the provision of the Constitution. Nowhere in the Constitution says that interpretation of the Constitution, Federal or State is a matter within the jurisdiction of the Syariah Court to do. The jurisdiction of Syariah Courts are confined to the limited matters enumerated in the State List and enacted by the respective state enactments. …

“[17] ... Nowhere in the Constitution is there a provision that the determination of Islamic Law for the purpose of interpreting the Federal Constitution is a matter for the State Legislature to make law to grant such jurisdiction to the Syariah Court. Hence, there is no such provision in the State Enactments to grant such jurisdiction to Syariah Courts. In fact, it cannot be done.

> "[18] Reliance was made on the provision of art 121(1A) of the Constitution. With respect, this article does not confer jurisdiction on Syariah Courts to interpret the Constitution to the exclusion of this court.
>
> "[19] As I have said a number of times, ending with *Latifah*, that provision was inserted to avoid a situation as in *Myriam v Mohamed Ariff* [1971] 1 MLJ 265, not to oust the jurisdiction of this court in matters that rightly belong to it. Before the jurisdiction of this court is excluded, it must be shown that the Syariah Court has jurisdiction over the matter first. That is not the case here. .. "
>
> [Emphasis supplied]

60. The principles in *Latifah* have also been applied, although distinguished on the facts, by the High Court in *Dato' Kadar Shah TunSulaiman v DatinFauziahHaron* [2008] 4 CLJ 504 [IAP-1, Tab 5] where the High Court Judge Y.A. Dato' HishamudinYunus (as His Lordship the Court of Appeal Judge then was) said [@ pg 510, para 15 & 16]:

"[15] In my judgment, where there is an issue of competing jurisdiction between the civil court and the Syariah Court, the proceedings before the High Court of Malaya or the High Court of Sabah and Sarawak must take precedence over the Syariah Courts as the High Court of Malaya and the High Court of Sabah and Sarawak are superior civil courts, being High Courts duly constituted under the Federal Constitution. Syariah Courts are mere state courts established by state law, and under the Federal Constitution these state courts do not enjoy the same status and powers as the High Courts established under the Courts of Judicature Act 1964. Indeed, the High Courts have supervisory powers over Syariah Courts just as the High Courts have supervisory powers over other inferior tribunals like, for instance, the Industrial Court.

"[16] Of course, I am constantly conscious of (and, perhaps, troubled by) cll (1) and (1A) of art 121 of the Federal Constitution. But these provisions cannot be interpreted literally or rigidly. At times common sense must prevail. In

interpreting them the purposive approach must be adopted."

[Emphasis added]

Lina Joy's case wrongly decided

Majority decision

61. It is submitted that the *ratio decidendi* ofthe Federal Court's decision in *Lina Joy Lwn. Majlis Agama Islam Wilayah Persekutuan & Yang Lain* [2007] 3 CLJ 557, FC [IAP-2, Tab 33]has been implicitly, if not explicitly, overruled by the decision of subsequent Federal Courts in the above mentioned cases of *Latifahbte Mat Zin*and *Abdul Kahar bin Ahmad*.

62. The majority of the Court in *Lina Joy* based their decision on two key assumptions:

62.1. firstly, that *murtad* or "apostasy" is a matter of Islamic law [see IAP-2, Tab 33 @ p 572c, 573a, 575g-h, 576a-b, 581, para 10.1 and 582a-c], and

62.2. secondly, so long as a matter is a matter of Islamic law, the Syariah courts have jurisdiction [see IAP-2, Tab 33 @ 581, para 10.1 and 582a-c]

63. The Federal Court in *Latifah Md Zin* and *Abdul Kahar* have determined that the second assumption is incorrect. The appropriate method is to see if jurisdiction has been conferred by the relevant State enactment. It must also be shown that the State Legislature is able to grant such jurisdiction in that it must be over one of the subject matters provided for in item 1, List II, 9th Schedule, Federal Constitution and must be only where all persons are professing Islam. The Federal Court also reiterated that the Syariah Court cannot be granted jurisdiction to determine constitutionality or to interprete State law.

64. The learned Judge speaking for the majority of the Federal Court in *Lina Joy* rested on the assumption that the Islamic authorities were to determine as a matter of Islamic law if the applicant there had apostasized. Even after reciting the arguments of counsel for the MCCBCHST and HAKAM as to the meaning of the word "*profess*", the learned Judge still (@ 587e) premised his

dismissal of those arguments (which it is submitted was *obiter*) on the assumption that the Islamic authorities needed to determine Lina Joy's apostasy from Islam. His Lordship then immediately followed this discussion by again reiterating the jurisdiction of the syariah courts and the civil courts, with an analysis in paragraphs 15 and 16 of His Lordship's judgment on the effect of *Soon Singh* and an affirmation of the approach therein to infer which jurisdiction from the legislative list – an approach explicitly disavowed by the Federal Court in *Latifah* and in *Abdul Kahar* [see also page 619,paragraph 102 in the dissenting judgment in *Lina Joy*].

65. With respect, it should also be pointed out that the learned Judge who dissented in *Lina Joy* recognized that the issue was not one of Islamic law but that of statutory law: see pages 609, para 72; page 613, para 83 and 614, para 87.

66. At page 587, para 15, it can be seen that the majority categorized the declaration sought by Lina Joy as a declaration that her actions in leaving Islam had validly caused her to cease

to be a Muslim. This shows a crucial distinction in the case now before the Federal Court.

66.1. Here, there is no invitation to the Federal Court to delve into any matter of Islamic law.

66.2. Rather in the Originating Summons before the High Court and in the Questions before this Court under the Special Reference, what is sought is an application for declaratory relief under Article 4 of the Federal Constitution that various provisions of Selangor State legislation are inconsistent with the Federal Constitution, for an interpretation of the Federal Constitution and for consequential relief that the Appellants are not included within that part of the Selangor legislation that is found constitutional.

67. A proper appreciation of this issue shows that the question here is not one of “apostasy” from Islam under Islamic law.

67.1. Under Islamic law, a person may not be considered an apostate despite his profession of another faith. We saw that in the well publicized case of Revathi (widely publicized in the media and televised in the international news channel Al Jazeera English), where the Syariah Court refused to allow a woman to leave Islam despite the fact that she had been detained for 6 months in a rehabilitation camp and still maintained she was a Hindu. Nevertheless, the issue is whether or not someone who the Islamic authorities consider still a "Muslim" is nevertheless protected from the imposition of Islamic law if he does not profess himself to be a Muslim.

See *http://www.youtube.com/watch?v=mgnncfYRPxk*

67.2. Is that person entitled to Constitutional protection or does the Constitution allow Islam to be forced on him by the Government and the Islamic authorities?

67.3. Hence, the core issue (which it appears that no Court in Malaysia has yet properly considered) is whether it would

be inconsistent with the guarantee of religious liberty found in Article 11 for the Government to require a person to obtain the permission of Islamic religious authorities before Islamic law ceases to apply to him, even when that person says he never ever professed Islam as his religion. This is the issue squarely addressed by this Originating Summons, and which is crying out for a judicial solution.

68. Article 11(1) is meant to protect individuals from oppression by the Government. Article 11(3) is meant to protect religious communities from interference from the Government. The argument and decision of the majority of the Federal Court in *Lina Joy*, with respect,turns human rights protections and the role of the judiciary on its head by interpreting Article 11 perversely to enable the Government to enforce a religious community's oppression of a former adherent of that religion. With respect, the majority in *Lina Joy*:

68.1. ignored the very fundamental basis of constitutional jurisprudence that the Courts established by the Federal Constitution exist to preserve the fundamental liberties of

the people and minorities against the oppression of the majority, as a vital check and balance to the power of the Legislature and the Executive;

68.2. did not give proper regard to the sanctity of the individual right to freedom of religion;

68.3. did not apply some of the most basic principles of constitutional jurisprudence to ascertain if the requirement for permission from the Syariah authorities (if indeed such a requirement exists) was necessary to preserve the rights and freedoms of others and whether it was a proportional response to such a need; and

68.4. did not even consider whether the restrictions on professing and practising a religion other than Islam to those born to Muslim parents was sanctioned by any *general* law relating to public order, morality or health which are the only permissible restrictions under the Federal Constitution on any act in the exercise of one's

fundamental liberty to profess and practise one's religion: Article 11(5), Federal Constitution.

69. More telling of the majority judgment is the way the learned Judges, with the greatest of respect, incorrectly applied and misstated the effect of the previous Supreme Court decision in *Che Omar CheSoh* [IAP-4, Tab 59] on the effect of Article 3 of the Federal Constitution.

69.1. Citing SallehAbas LP in *Che Omar CheSoh*, the majority of the Federal Court in *Lina Joy* stated that *"Islam is not just a mere collection of dogmas and rituals but it is a complete way of life covering all fields of human activities, may they be private or public, legal, political, economic, social, cultural, moral or judicial"*. The Federal Court in *Lina Joy* then went on to hold that this meant that Islamic law could be implemented to restrict a person from adopting a new religion.

69.2. With respect, this was a glaring error totally misreading the actual decision in *Che Omar CheSoh* which expressly said

the above interpretation of "*Islam*" was not that intended in Article 3 of the Federal Constitution. In *Che Omar CheSoh* the Federal Court expressly ruled that the law in Malaysia was secular law, and that as such a challenge to the mandatory death penalty for certain drug trafficking offences for being unconstitutional as it fell foul of Islamic principles was dismissed. [IAP-4, Tab 59]

Minority judgment

70. In the circumstances, it is perhaps unsurprising that the learned Judge in the minority in *Lina Joy* found he had to remind himself, again citing SallehAbas LP in *Che Omar CheSoh*, that his duty as a Judge was to apply the Constitution no matter what his personal beliefs were [IAP-2, Tab 33, page 597, para. 22].

70.1. The learned Judge correctly identified that any legislation made by Parliament or any State legislature pursuant to the legislative lists must ultimately be subject to the terms of the Federal Constitution, and mentioned specifically the

fundamental liberties provisions of the Federal Constitution [IAP-2, Tab 18, page 602-604, para. 51-55].

70.2. His Lordship then ruled that the core issue in *Lina Joy's case* was whether the National Registration Department was entitled in law to require an apostasy certificate from the religious authorities before it would remove the notification "Islam" in the applicant's identity card. On this, His Lordship found this was an impermissible exercise of administrative discretion because the very requirement to endorse the fact that the application was a "Muslim" was contrary to the guarantees of equality under the law under Article 8 of the Federal Constitution since the notation of "Muslim" was only required for Muslims, and was therefore discriminatory. [at pages 606-607, para 63-64]

70.3. Further, His Lordship also commented that to subject the applicant to potential penalties under the various syariah enactments in order to go to the syariah courts for a certificate of apostasy was an unreasonable requirement

contrary to the principle against self incrimination [at pages 614, para. 87-88].

71. As such, given the key steps in the reasoning of the majority in the *Lina Joy* are deemed to have been overruled by *Latifah* and *Abdul Kahar*, and given the glaring error in its statement as to the effect of *Che Omar CheSoh*, it is submitted that the majority decision in *Lina Joy* does not in any way affect the appeal herein.

Section of the Selangor Enactment

72. Despite the majority's advice in *DalipKaur* for States to enact clear provisions to recognise individuals who have ceased to profess Islam (i.e. thorough a register of converts), the States have not done so. Instead, the Federal and State governments continue to unconstitutionally impose unreasonable restrictions on people in the Applicants' position who merely seek the right to profess and practice their religion in peace and harmony.

73. The impugned section 61(3)(b)(x) and (xi) of the Selangor Administration Enactment [IAP-1, Tab 5] purports to confer

jurisdiction on the Syariah courts to determine if a person is still a Muslim. But that provision, and the requirement imposed by the Judiciary through the obiter comments of Mohamed Yusoff SCJ in *DalipKaur* and then through the faulty reasoning in Lina Joy is that for the purposes of civil law, the rules of Islamic law must be applied. This is not the Constitutional position.

74. The distincition is well illustrated by the Privy Council decision from Quebecof *Despatie v Tremblay* [1921] 1 AC 702 @ 714 [IAP, Tab]. A husband sought to invalidate his marriage with his fourth cousin on the basis that it went against the provisions of Roman Catholic law. He relied on a provision of the Quebec Civil Code which provided that other impediments to a marriage under any faith were subject to the rules hitherto followed in those respective faiths. The Privy Council pointed out that the individual's right to profess a religion was his own right. The provision of the Code in dispute was on the other hand a manifestation of the community's right to manage its affairs. It could prohibit the person concerned being married in its Churches. But its religious practices and injunctions could not be

used to dictate civil rights established by a marriage duly registered under the Code.

75. Given that we have seen that each of the Applicant's have a right to profess "his religion", and that the word "profess" means self acknowledged, this must mean that each of the Applicants have the right to profess and practise the religion of their own choice. They cannot be subjected to permission in order to enter into or leave a religion by their former religion. The provisions of the section are unconstitutional in requiring the Applicants, who profess Hinduism and have done so all their lives, to submit themselves to be adjudged in accordance with the theological law of Islam on whether or not they are "Muslim" or not.

76. As pointed out above, the Constitution does not permit religious organisations to trap people within their fold just because of their own religious practices. Their communal rights cannot trump the individual's right to profess and practise his or her own religion. The State can only restrict the right to practice religion if a person does an act which is contrary to a "general law" relating to public order, health or morality. You cannot create a specific

law to prohibit the right to practice a religion purely on public order – it must be a general law.

Question 5: The national registration regulations prohibiting change of religion as a reason for changing one's name is unconstitutional

77. This Question follows on from the issues raised in the previous question. To give effect to the unconstitutional State law and the effect of the Lina Joy decision requiring those unlawfully classified as "Muslim" to get a Syariah court's permission to "leave" Islam, the national registration regulations were amended so that the Registrar no longer is under an obligation to register a change of name but now has a discretion to refuse to register the same when a change of religion is the reason for the change of name. The impugned Regulation 14(2)(b) [IAP-1, Tab 6] requires any person applying to change their name to submit to the JabatanPendaftaran Negara a statutory declaration containing the reason for such a change of name"*other than a conversion of religion*". The impugned Regulation thus prohibits all Malaysians from changing their name as a result of conversion

of religion.In practice, the NRD requires the person to obtain a letter of permission or confirmation from a religious organisation before any change is effected.

78. Because of the unconstitutional treatment of the Applicants as "Muslim" even though they have never ever professed Islam as their religion, the Applicants are treated as "converts" when in fact they have always professed and practised Hinduism. They are not "changing" their religion – they have been prevented all this while by the Government from professing and practising their religion, and have had Islam forced on them. Hence, the Applicants are caught by the impugned Regulation.

79. A prismatic reading of the concept of '*personal liberty*' in Article 5(1) of the FC and the right to freedom of religion in Article 11(1) suggests that this regulation is inconsistent with the Federal Constitution. Given the primacy of religious freedom rights in our Federal Constitution, this regulation treating religious freedom and imposing such a restriction on a citizen's free profession of his or her faith is a clear violation of the Constitutional guarantees.

80. This is especially given that the Applicants also have a right to privacy, as specifically confirmed by the Federal Court recently in *SivarasaRasiah v BadanPeguam Malaysia &Anor*[2010] 3 CLJ 507 @ Para 15[IAP-3, Tab 43].The right to privacyencompasses a person's expression of his identity and therefore includes the right to choose and change one's own name. As a means of personal identification, a person's name concerns his private life. The fact that the State has an interest in regulating the use of names does not exclude this: *Burghartz v Switzerland* (Application no. 16213/90) @ Para 24, Judgment, European Court of Human Rights, Strasbourg, 22 February 1994 [IAP-5, Tab 93]).

81. The decision of the United Nations Human Rights Committee (UNHRC) in *Coeriel and Aurik v The Netherlands Communication* No. 453/1991, 31 October 1994, CCPR/C/52/D/453/1991, Human Rights Committee [IAP-5, Tab 92]is particularly instructivehaving facts quite similar to the instant case, though it dealt with religious converts from Christianity to Hinduism, rather

than persons who were being wrongly classified as belonging to a particular religion against their will only because of their birth.

81.1. In *Coeriel*, the Applicants adopted the Hindu religion and stated that that they wanted to study to become Hindu priests in India. They requested the Minister of Justice to have their surnames changed into Hindu names. They claimed that for individuals wishing to study and practice the Hindu religion and to become Hindu priests, it is mandatory to adopt Hindu names. The Minister of Justice rejected their request, on the ground that their cases did not meet the requirements set out in the 'Guidelines for the change of surname'.

81.2. The Applicants communicated a complaint to the UNHRC, claiming that the refusal of the Dutch authorities to have their current surnames changed constitutes unlawful or arbitrary interference with their privacy. The UNHRC held:-

> "The Committee observes that article 17 [of the International Covenant on Civil and Political Rights] provides, inter alia, that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence. The Committee considers that *the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity*, be it by entering into relationships with others or alone. The Committee is of the view that *a person's surname constitutes an important component of one's identity and that the protection against arbitrary or unlawful interference with one's privacy includes the protection against arbitrary or unlawful interference with the right to choose and change one's own name.*" [Emphasis added]

82. Utilising the test enunciated by the *Supreme Court* in *NordinSalleh*[IAP-3, Tab 49], the impugned Regulation directly affects the Appellants' profession of their religion, especially when read together prismatically with the right to personal liberty encompassing their right to a name and to Privacy. By prohibiting them from changing their names as a result of professing their religion of Hinduism. The impugned Regulation arbitrarily

interferes with their ability to freely express their identity as a Hindu.

83. In the instant case:-

83.1. The object of the impugned Regulation and all other laws related to National Registrationisto provide for the registration of persons and the issuance of identity cards for purposes relating to *internal security.*This is stipulated by the Constitution itself (See: Ninth Schedule List I Item 3(e) of the FC [IAP-1, Tab 3]). Thus, all particulars and requirements for the registration of persons and issuance of identification cards in Malaysia must relate to the objective of safeguarding the security of Malaysia.

83.2. The impugned Regulation distinguishes between those intending to change their name after conversion of religion (converts) and those intending to change their name for other purposes. The former is prohibited from changing their name. The prohibition of religious converts from changing their name has no rational connection to

safeguarding the security of Malaysia. The Supreme Courtin *Minister for Home Affairs, Malaysia &Anor. v Jamaluddin Othman* [1989] 1 CLJ 105 (Rep) [IAP-5, Tab 102] held:-

> "The sum total of the grounds for the detention was therefore the supposed involvement of the respondent in a plan or programme for the dissemination of Christianity among Malays. It is to be observed that the grounds do not however state that any actions have been done by the respondent except participation in meetings and seminars and that the fourth allegation alleged that the respondent converted into Christianity six Malays.
>
> We do not think that mere participation in meetings and seminars can make a person a threat to the security of the country. As regards *the alleged conversion of six Malays, even if it was true, it cannot in our opinion by itself be regarded as a threat to the security of the country*."
>
> [Emphasis added]

83.3. Thus it has been judicially held that the mere fact of religious conversions do not affect the security of Malaysia.

The impugned Regulation is doing more than is necessary to achieve its objective; it has deprived religious converts from their right to profess his or her religion, and his right to personal liberty encompassing a right to a name and a right to privacy.

83.4. Although the Applicants are not "converts", they are still caught by this Regulation.

84. In the circumstances, this Regulation too cannot stand in the face of the Constitutional protection to a person to profess his or her own religion, and must also be declared void. Question 5 should therefore also be answered in the affirmative.

Conclusion

85. As shown by the 4th Respondent in their affidavit, this case affects a very small minority of the Malaysian population. This is truly a case where the Applicants are crying out for this Court's assistance as the 3rd pillar of government in a democracy

entrusted to keep a check and balance on the majority so that minorities are not persecuted.

86. In concluding, the words of the former Lord President in *Che Omar*warrant remembering:-

> "... we have to set aside our personal feelings because the law in this country is still what it is today, secular law, where morality not accepted by the law is not enjoying the status of law."

87. These Hindus are being forced into Islam. This is wrong. It is unconstitutional. Only the Courts can stop it – the politicians and civil servants refuse to do so. We ask that all the Questions be answered in the affirmative, with a direction to the learned High Court Judge to allow all prayers in the Originating Summons.

Dated this 19th day of January 2012

FahriAzzat, K. Shanmuga
& Aston Paiva
Counsel for the Applicants

These Submissions are tendered to the Federal Court on behalf of the Applicants by their solicitors Kanesalingam& Co whose address for service is at Unit 3.3, Level 3, Wisma Bandar, 18, JalanTuanku Abdul Rahman, 59100 Kuala Lumpur.

[Ref: 9243s/ZA/2002]
Tel: 03 2698 9199 Fax: 03 2698 9799
Email: shan@kanesalingam.com / aston@kanesalingam.com